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IN THE

Supreme Court of the United States.

EX PARTE DAVID A. SACHS, *Petitioner.*

No. 16 Original.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

W. H. H. MILLER,
W. M. SMITH,
Attorneys for D. A. Sachs.

The Bellamack Press, Indianapolis.

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We beg to submit the following as supplemental to our brief filed herein on March 20, 1903:

We do not restate the facts, nor generally repeat the argument and citations of that brief.

But we submit the following as our contentions, and the authorities supporting those contentions, as cited in both briefs.

Points and Authorities.

1. The Floyd Circuit Court was in the lawful, *actual* possession of the property in controversy when the bankruptcy proceeding commenced.

First National Bank v. *U. S. Encaustic, etc.*, 105 Ind. 227;

Pressley v. *Lamb*, 105 Ind. 171.

The fact of actual possession is undisputed.

This proceeding in state court not subject to collateral attack.

Phelps v. *Mutual Reserve, etc.*, 112 Fed. 453;
Weiss v. *Guerineau*, 109 Ind. 438;
Hollinger v. *Keene*, 138 Ind. 363.

The suit in the state court not under an "insolvency law."

Mayer v. *Hellman*, 91 U. S. 496;
Carling v. *Seymour, etc.* (C. C. A.), 113 Fed. 483.

It is idle to say that the filing of the bill and procurement of the appointment of a receiver was a fraud on the state court because preferences had been given; since, in the absence of bankruptcy proceedings, the preferences were lawful.

Sandford Fork, etc., v. *Howe*, 157 U. S. 312, 317;
McCormick v. *Smith*, 127 Ind. 230, 235.

It was uncertain whether bankruptcy proceedings would ever be commenced.

2. The rules of comity between the state court and the United States District Court sitting in bankruptcy apply in all their breadth and force.

Peck v. *Jenness*, 7 How. 612 (Bankrupt Act 1841);
Eyster v. *Gaff*, 91 U. S. 521 (Bankrupt Act 1867);
Metcalf v. *Barker*, 23 Sup. Ct. Rep. 67 (Bankrupt Act 1898);
Carling v. *Seymour, etc.* (C. C. A.), 113 Fed. 483.

If the possession of the state court is *actual*, the fact,

(if it be a fact), that the jurisdiction of the Bankruptcy Court is exclusive does not warrant the latter court in taking the possession from the state court by summary proceedings.

Moran v. *Sturgis*, 154 U. S. 256;
The Oliver Jordan, 2 Curtis, 414;
Taylor v. *Carryl*, 20 How. 583;
The E. L. Cain, 45 Fed. 367;
The James Koy, 59 Fed. 784;
Carling v. *Seymour Lumber Co.* (C. C. A. 5 Cir.), 113 F. R. 483-490-1.

This case reverses same case (*Re Macon, etc.*) in 112 F. R. 323, where the district court seems to have held opinions similar to those of the district court in the case at bar.

See also, *Temple* v. *Glasgow* (C. C. A. 4 Cir.), 80 F. 443-446.

3. And the fact that the suit in the state court was not based on a valid lien is immaterial. The power of the bankruptcy court is as plenary when there are liens as when there are not.

R. S. 4972 (Act 1867), sections 2 and 69, Act 1898;
Johnson v. *Bishop*, 1 Wool. 324;
Bradley v. *Frost*, 3 Dillon 457;
In re Price, 92 Fed. 987;
In re Lingert, 110 Fed. 927;
In re Lesser, 100 Fed. 433;
In re Wells, 114 Fed. 222;
In re Ward, 104 Fed. 985;
Smith v. *Belford*, 106 Fed. 658;
Louisville Trust Co. v. *Comingore*, 184 U. S. 18.

For discussion of rule of comity.

Cozell v. *Heyman*, 111 U. S. 176.

4. Act of 1898 (as well as of 1867) provides for intervention by representative of bankruptcy court in suit in state court.

Section 11, sub. b. and c.

5. This was actually done in case at bar by a general appearance.

Exhibits A., B. and C., pp. 173 and 53.

6. This being done, the bankruptcy court was bound to await the decision of state court in ordinary way.

Peck v. *Jenness*, 7 How. 612, 625;
Johnson v. *Bishop*, 1 Wool. 324;
Doe v. *Childress*, 21 Wall. 643;
Scott v. *Kelly*, 22 Wall. 57;
Mays v. *Fritton*, 20 Wall. 414;
Davis v. *Friedlander*, 104 U. S. 570;
Winchester v. *Heiskell*, 119 U. S. 450;
Adams v. *Crittenden*, 133 U. S. 296;
Ludeling v. *Chaffe*, 143 U. S. 301.

The bankruptcy court never got lawful possession of the property.

a. Because such possession as it got from the state court's receiver was the result of a threat to take it with "a club."

b. Because the state court receiver could not deliver lawful possession without the consent of his court.

This is elementary.

Shields v. *Colman*, 157 U. S. 168;
White v. *Schloerb*, 178 U. S. 542;
Metcalf v. *Barker*, 23 Sup. Ct. Rep. 78;
The E. L. Cain, 45 Fed. 367-370;

The James Roy, 59 Fed. 784;
Moran v. Sturgis, 154 U. S. 256.

7. The amendment to the bankrupt act of February 5, 1903, making a receivership an act of bankruptcy, is not retroactive so as to apply to this case.

All bankrupt acts have been prospective as to acts of bankruptcy.

Act 1841, 5 Stat. at Large 442;
Act 1867, 14 Stat. at Large 536;
Act 1898, sec. 71;
Chew Hong v. U. S., 112 U. S. 536, 559;
Endlich Statutes 276;
McElwan v. Den, 24 How. 245.

If the amendment is not retroactive, this receivership was not an act of bankruptcy.

In re Wilmington Hosiery Co., 120 F. 180; also 179.

ARGUMENT.

I.

1. The grant of powers to the district court sitting in bankruptcy as to dealing with property, liens and conflicting claims, was broader and more clear in the bankruptcy act of 1867 than in that of 1898.

The act of 1867 (R. S. 4972) reads as follows:

"Sec. 4972. The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bank
rupt.

Third. To the ascertainment and liquidation of the
liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities
and conflicting interests of all parties.

Fifth. To the marshaling and disposition of the dif
ferent funds and assets, so as to secure the rights of al
parties and due distribution of the assets among all the
creditors.

Sixth. To all acts, matters and things to be done un
der and in virtue of the bankruptcy, until the final dis
tribution and settlement of the estate of the bankrup
and the close of the proceedings in bankruptcy."

And section 5024 provides for provisional seizures b
the marshal as in the present act.

Section 2 of the act of 1898, so far as pertinent her
reads as follows:

"Sec. 2. That the courts of bankruptcy * * *
are hereby invested with jurisdiction * * * to

(2) allow claims, disallow claims, reconsider allowe
or disallowed claims, and allow or disallow them again
bankrupt estates;

(3) appoint receivers or the marshals, upon applic
tion of parties in interest, in case the courts shall find
absolutely necessary for the preservation of estates,
take charge of the property of bankrupts after the fil
of the petition and until it is dismissed or the trustee
qualified."

(To same effect is section 69):

"(6) bring in and substitute additional persons or e
ties in proceedings in bankruptcy when necessary for
complete determination of a matter in controversy;

(7) cause the estates of bankrupts to be collected,
duced to money and distributed, and determine con
versies in relation thereto, except as herein otherw
provided.

(15) make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

In passing it may be remarked that it seems clear that neither the clause in section 2, nor in section 69, authorizing a provisional seizure, before adjudication, by the marshal or by a receiver, is intended as a warrant for such a seizure from any party except the bankrupt himself, or some one clearly standing in his shoes. Because, in section 69, it is provided that "such property shall be released if such bankrupt shall give bond in a sum which shall be fixed by the judge," etc. In other words, no provision is made for a third party, from whom property has been seized, releasing the same by giving a bond, which, it would seem, certainly would have been done if such seizure from a third party had been intended.

Section 5044, Revised Statutes, provides that all attachments on *mesne process* issued within four months prior to the commencement of the bankruptcy proceedings shall be dissolved by the assignment made by the referee to the assignee. This provision is absolute.

Section 67, act 1898, paragraph e, has a like provision, *conditional*, however, upon the following facts:

1. If when lien attached bankrupt was insolvent *and* the attachment will work a preference.

2. If attaching creditors had reasonable cause to believe defendants insolvent and in contemplation of bankruptcy.

3. That such lien was sought or permitted in fraud of this act.

4. And paragraph f, of the same section 67 makes all levies, judgments, attachments or other liens obtained through legal proceedings against any person who is in-

solvent within four months invalid in case of bankruptcy
And this without any expressed conditions. Whether
paragraph e. and paragraph f. must not be construed to
gether, and the conditions of the former be implied in th
latter, it is not necessary here and now to inquire. Cer
tainly, so far as authority granted to the bankrupt
court to take possession of and adjudicate with referenc
to property, there is nothing in the present act, at th
utmost, giving a wider, if so wide, a scope to such au
thority than in the act of 1867.

Yet in the tenth edition of Bump on Bankruptcy, pa
213, published in 1877, the following is given as the r
sult of the decisions to that time:

"How far the courts of bankruptcy, in the exercise
their jurisdiction, may interfere with other courts, is
question that has been much discussed, and is not entire
free from difficulty. They clearly have no authority
withdraw cases instituted in other courts before the co
mencement of proceedings in bankruptcy from the
courts and proceed to settle and adjust the claims of t
parties thereto. Congress could, no doubt, have ma
an adjudication in bankruptcy operate *proprio vigore*
transfer all cases which should be pending in other cou
at the time of the filing of the petition, and to which
bankrupt should be a party, from those tribunals into
courts of bankruptcy. It has not, however, done so.
not only has not deprived the other courts of jurisdict
over such causes, but it has provided for their prosecut
and defense in those courts by the assignee. This p
ciple applies not only to all ordinary actions to colle
debt, but also to all proceedings to enforce a lien.
lien of an attachment, or the lien of a creditor u
property conveyed in fraud of creditors, or the lien
partner upon partnership funds, or the lien created b
mortgage, may be enforced in other courts when
ceedings for that purpose have been instituted before
commencement of the proceedings in bankruptcy. I
ing obtained lawful jurisdiction over the parties and

ject-matters, they have the right to determine all questions, as they arise, according to law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by them."

"So, also, where a receiver, appointed by another court before the commencement of proceedings in bankruptcy, has taken possession of the property which belonged to the bankrupt, and the jurisdiction of such court over the subject-matter of the suit therein, and over the parties thereto when it was instituted and the receiver was appointed, and its jurisdiction to appoint such receiver are in no manner impeached or questioned, the courts of bankruptcy can not compel the receiver to give up the possession of such property without its being shown that such possession of the property by such court is void or invalid by reason of the provisions of the bankrupt law. When property is lawfully placed in the custody of a receiver by the court which appoints him it is in the custody and under the protection and control of such court for the time being, and no other court has the right to interfere with such possession, unless it be some court whose process has first taken possession, or some superior jurisdiction in the premises. Under such circumstances the courts of bankruptcy have neither such superior jurisdiction, nor such supervisory control, as to authorize them to take the property from the possession of such court, or to enjoin the receiver from further interfering with it."

Without stopping to inquire whether this is a correct summary of the law in all respects, it certainly has the support of the decisions of this court, where the representative of the bankruptcy court has intervened in the state court.

In the case at bar, as shown by his petition and the order of the Floyd Circuit Court (Volume Exhibits A., B. and C., filed with petitions, at page 173, and the order made thereon at same page), the receiver of the bank-

ruptcy court entered a general appearance and filed his petition invoking the jurisdiction and action of that court.

(This order appears in its proper place in the transcript from the Floyd Circuit Court (page 53, same volume), but the petition, being off the files at time that record was made, was introduced in evidence separately.)

Having thus made himself a party and submitted himself to the jurisdiction of that court, neither he nor the court he represented could, because an order such as was wanted was not made *instanter*, take the matter into their own hands and by threats of the use of a "club" take the property out of the hands of the Floyd Circuit Court, without the consent and against the will of the latter court.

Having voluntarily gone into that court, and invoked its action, he must abide its decision, and, if not satisfactory, have the same corrected by a higher court. The petition filed by Receiver Connor in the state court presented issuable facts, and certainly without proof of them the state court was not bound to surrender the property.

Johnson v. *Bishop*, 1 Wood. 329.

Scott v. *Kelly*, 22 Wall. 57, seems to us exactly in point. That was an attachment in a state court of New York. The bankruptcy proceeding was commenced within a month after the attachment in the state court was commenced, and one day before the attachment was levied. The assignee was summoned into the state court and contended that he was entitled to the proceeds of the attached property. This court said:

"The assignee in bankruptcy voluntarily submitted himself and his rights to the jurisdiction of the state court. Being summoned, he appeared, without objection, and presented his claim for adjudication by that court. No effort was made to remove the litigation to

the courts of the United States. It is now too late to object to the power of the state court to act in the premises and render judgment."

To the same effect are:

Mays v. *Fritton*, 20 Wall. 414;
Davis v. *Friedlander*, 104 U. S. 570;
Winchester v. *Heiskell*, 119 U. S. 450;
Adams v. *Crittenden*, 133 U. S. 296;
Ludeling v. *Chaffe*, 143 U. S. 301.

If it be conceded that the title and right of possession of the property in this case was in the receiver of the bankruptcy court, the rule is the same. The question is one of orderly procedure. Having applied to the state court for an order for the delivery of the property, he must await that order. The presumption is that it will be made in due time and according to law.

As Mr. Justice Miller says, in *Johnson* v. *Bishop*, 1 Wood. 324, on p. 330:

"If the state courts fail to recognize his legal rights, a presumption not here to be indulged, he can, in the proper mode, bring the case from the highest court of the state to the highest court of the United States. *Peck* v. *Jenness*, 7 Howard 612."

If the bankruptcy receiver had made only a special appearance in the state court, as to this point a different question would have been presented. Under such an appearance he might have applied for a stay of proceedings under section 11, act 1898, and got it (*Markson* v. *Haney*, 47 Ind. 311), and perhaps otherwise preserved his rights without voluntarily submitting to the jurisdiction of the state court.

II.

In addition to what was said in the original brief, one word as to the contention that it is only in cases where there are valid liens that *Peck* v. *Jenness*, *Eyster* v. *Gaff*, and other cases relied on by us apply.

As shown in our original brief, this is, as matter of fact, a mistake.

But no such distinction has any basis in principle. As above shown, section 4972 (act 1867) gave to the bankruptcy court powers plenary over all the assets of the bankrupt, including the "ascertainment and liquidation of the liens and other specific claims thereon," and "the adjustment of the various priorities and conflicting interests of all parties." That is, the powers of the bankruptcy court over property subject to liens was just as broad as though no lien were upon it.

In view of these provisions it seems to us clear that there is no reason in saying that the bankrupt court may take property by summary process from a state court if not subject to a lien; but if there is a lien on such property, however small, the state court may hold it.

It seems to us that the question of lien or no lien is nothing; but the fact that the property is in the custody of a state court and the consideration due that court are everything. The *actual* taking of possession by the state court is the test.

Moran v. *Sturgis*, 154 U. S. 256, 276 to 280.

In every admiralty case cited in *Moran* v. *Sturgis*, the jurisdiction of the district court is exclusive, yet as against *actual* possession in the state court, the district court, it was held, could not take the property.

The Oliver Jordan, 2 Curtis 414;

Taylor v. *Carryl*, 20 How. 583, 601;

The E. L. Cain, 45 F. 367;
The James Roy, 59 Fed. 784.

The last cited case distinguishes an assignment from a receivership.

Temple v. *Glasgow* (C. C. A., 4th Cir.), 80 F. 443-446.

The same rule is enforced in bankruptcy under present law.

Carling v. *Seymour, etc.* (C. C. A.), 113 F. 483-490-1.

III.

In the opinion of the district judge (Exhibits A., B. and C., filed with the petitions, page 161), much stress is laid on the case of *Clarke* v. *Larremore*, decided February 23, as contrary to our contentions, as to the effect of *Metcalf* v. *Barker*, and contrary to the applicability of the rules of comity in such cases.

We submit:

First, as to *Metcalf* v. *Barker*, the learned judge pays no attention to the part of that opinion on which we relied, viz.: that part referred to in the second paragraph of the syllabus, and affirming the rule of comity.

Second. In the Larremore case, 23 Sup. Ct. Rep. 363, no question of comity was raised, considered or involved. The execution creditor and the sheriff were both summoned as parties into the bankruptcy court, as well they might be under subdivision 6 of section 2 (act 1898), which provides that the court "may bring in and substitute additional persons or parties in proceedings in

bankruptcy when necessary for the complete determination of a matter in controversy.

Being thus made parties they both had a full hearing on the merits four times (*In re Kenney*, 95 Fed. 427, District Court, 97 Fed. 554, District Court, 105 Fed. 897, Circuit Court of Appeals, and finally in this court); and so far as appears, the question of comity was never thought of as involved in the case by either court or counsel. It seems to us that case, therefore, is very far from being an authority for the proposition that, where a state court has, by due course of law, taken property into its custody by its receiver, the bankruptcy court, without summoning that receiver or the creditors at whose instance he was appointed into that court, can, by a summary order, demand the property, and, if not delivered instanter, throw that receiver and all who have advised or in any way assisted him into jail for contempt.

Especially does this seem unwarranted after the receiver of the bankruptcy court has entered his full appearance in the suit in the state court and invoked its decision as to his right to the property.

IV.

As to the amendment of February 5, 1903, making a receivership an act of bankruptcy (act 1898, section 3, sub-section 4), we submit it can not apply to this case:

1. As shown in our former brief, by the original act it was expressly provided that no involuntary petition should be filed within four months of the enactment of the law, thereby preventing any act committed prior to the enactment of the law being challenged as an act of bankruptcy.

2. The act of 1841 also applied only to acts in the future.

The language is:

"Whenever such person, being a merchant, etc., *shall* depart from the state with intent to defraud his creditors, or *shall*," etc., etc.

5 Stat. at Large 442.

3. So in the act of 1867, the language is:

"Any person * * * who, after the passage of this act, shall depart," etc., etc.

14 Stat. at Large 530.

4. The amendment of February 5, 1903, adds "mining" corporations to the list of those which may be adjudged involuntary bankrupts.

Section 4 b.

Can such adjudication against a mining company be made for an act done before the bankrupt law applied to it at all?

It seems to us this question must be answered in the negative, according to all rules of statutory construction.

V.

This receivership in the Floyd Circuit Court was a legitimate and proper proceeding under the statutes of Indiana. This has been repeatedly adjudged by the supreme court of Indiana.

First National Bank v. *The United States, etc.*, 105 Ind. 227;

Pressley v. *Lamb*, 105 Ind. 171.

The head notes of the former case are as follows:

"Receiver.—Appointed by Judge in Vacation.—Insolvent Corporation.—Under section 1222, R. S. 1881, a

judge in vacation may appoint a receiver for a corporation which is in imminent danger of insolvency."

"Same.—Answer Admitting Complaint.—Adversary Proceeding.—Upon the filing of a complaint against such a corporation, alleging such cause for the appointment of a receiver, an answer admitting the truth of the complaint does not make the suit less adversary in character than it otherwise would be."

"Same.—Voluntary Appearance of Defendant.—The voluntary appearance of the defendant in such proceeding is equivalent to the service of process, and the suit is commenced and pending at and from the time of such appearance. Sections 315 and 1230, R. S. 1881."

"Same.—Validity of Proceeding in Vacation.—Collateral Attack.—The court having jurisdiction of the subject-matter of the suit and of the parties, the proceedings and orders of the judge in vacation are the proceedings and orders of the court, and, even if erroneous, are not void, and can not be collaterally attacked."

Unless this law is construed as retroactive it is clear that not only the creation of the state receivership was not an act of bankruptcy, but it furnished no ground for imputing to defendant an intent to evade or commit a fraud against the bankrupt act.

In re Wilmington Hosiery Co., 120 F. R. 179 and 180.

VI.

But it was insisted by the honorable district judge on the hearing below, and the claim is reiterated and emphasized in his opinion, delivered at the conclusion of the trial, (Exhibit B to Petitions, page 158), that this property "was *voluntarily* and *freely* turned over" by the state court receiver to the federal court receiver.

We submit that in this the district judge was mistaken both as matter of law and of fact.

First, as matter of law, neither the receiver of the Floyd Circuit Court, nor his attorney, had any authority to turn the property over to the receiver of the district court.

On pages 41 to 49 of the Exhibits to the petitions will be found the report and petition of the New Albany Trust Company, the receiver of the Floyd Circuit Court, asking instructions with reference to going to the federal court, and presenting the matters in controversy to that court. And on pages 50 to 53 is the order of the Floyd Circuit Court upon that petition.

At the bottom of page 51, we find the following:

"And said receiver is now hereby ordered and directed through its attorney, to proceed to Indianapolis, Indiana, and there, by a limited appearance and by protestation against appearance only, by petition upon such appearance only, lay before said District Court of the United States for the District of Indiana, the facts with regard to the matters herein," etc.

On the bottom of page 52, we find the following:

"It is further ordered that this court shall retain such control of said matters as may be necessary for the purpose of the entry of any and all such orders as may be deemed proper and necessary herein and therein."

In this order is found the only and entire authority for any action on the part of the receiver of the state court with reference to the federal court, and very clearly there is in it no authority to surrender the property. Not only so, but on page 54 the receiver and Mr. Watts, its attorney, make to the Floyd Circuit Court a report, and, on page 55, we have the order of the court refusing to sanction what has been done, and a rule against Watts for contempt of the Floyd Circuit Court for such action. And on page 56 we have the further report of the New Al-

bany Trust Company, of its offer to turn over said prop erty to the federal receiver, and the tender of its resig nation as receiver of the state court. And on page 57, the order of the judge of the Floyd Circuit Court, citing that company to show cause why it should not be attached for contempt for such action. And thenceforward the entire proceedings show most clearly that the state court never either authorized or consented to the delivery of this property.

Could property in custody of a court be turned over by its receiver to another court without the consent and against the will of the former court?

Judge Simonton answers this question in *The E. A. Cain*, 43 Fed. 367, on page 369, as follows (cited with approval in *Moran* v. *Sturgis*):

"The tug thus was in the custody of the law. Beach, Rec., sec. 221; *Covell* v. *Heyman*, 111 U. S. 176, 4 Sup Ct. Rep. 355. No act of the receiver, no waiver of claim on his part, could change the status of the property, or affect the control of the court. Even his refusal to ac cept the appointment, or to act on the order, or his wil ful abandonment of his duty, would not work such change or affect such control. Beach, Rec. *supra*. The receiver derives his whole authority from the court, acts under its orders, has little or no discretion; none, indeed not reviewable by and under the control of the court. See *Thompson* v. *Insurance Co.*, 136 U. S. 287; 10 Sup Ct. Rep. 1019. As he took custody by order of the court, he can release from custody only by its order; and if the property, being in the custody of the law, is placed in his keeping, his laches, even his abuse of his authority can not take it out of such custody. Wherever, within the territory of the court, the property is, it is in the cus tody of the law. The presence of the officer is simply a form of notice of this. His absence does not destroy this custody. This being so, and this tug having been taken possession of by process of the state court, an

by that court placed in the custody of its receiver, it can not be held by any process out of this court until discharged by the order of the state court."

Second. As matter of fact, when upon the witness-stand, Henry E. Jewett, the vice-president and representative of the New Albany Trust Company, who went under the order of the Floyd Circuit Court to Indianapolis, and, under protestation and a special appearance, made the representation to the district court, and who, it is claimed, surrendered this property, "voluntarily and freely," testified that, during the presentation of the matter to the honorable district judge, the latter insisting upon his right to the property, said, in substance: "I do not want to go to New Albany with a club, but I will do so if it is necessary to sustain the jurisdiction of this court." Transcript of Evidence, page 168.

This occurrence is set forth in the printed petition of Mr. Watts to this court, on page 14, where it is said:

"That after said explanation and statement had been made and argued by this petitioner before the said United States District Court, which argument and explanation consumed several hours and continued over from Monday, February 16, until Tuesday, February 17, the judge of said United States District Court refused in any way or to any extent to reconsider, modify or set aside his said order directing Frederick D. Connor, receiver of the said United States District Court, to summarily take from the receiver of the said Floyd Circuit Court the said property, but on the contrary peremptorily demanded of said Henry E. Jewett, as the representative of the New Albany Trust Company, to state whether or not he would turn over the property, in the hands of the New Albany Trust Company as receiver, to Frederick D. Connor, receiver, and so demanded of this petitioner whether or not he, as counsel for the New Albany Trust Company, receiver, would advise it to turn over said property to Frederick

D. Connor, receiver, the judge remarking at the time that he did not want to go to New Albany with a club, but would do so if necessary to obtain the property. Under these circumstances, and not otherwise, and believing that said demand of said judge of said United States District Court was peremptory, the petitioner, as counsel for the said New Albany Trust Company, stated that he would advise the said New Albany Trust Company, receiver, to turn over said property to the said Frederick D. Connor, receiver."

The petition of Sachs contains the same statement.

It is submitted that, under the circumstances, even if the state court receiver and Watts had had authority so to do, this was not a voluntary and free turning over of the property.

It is submitted further, that Mr. Watts and Mr. Jewett, the representative of the trust company, did not misinterpret or give undue weight to the language, or to the "club," of the honorable district judge, as is shown by the subsequent proceedings in the case.

On the trial, the learned judge, while Mr. Watts was upon the witness-stand (pages 228-9), demanded that he should declare whether he defended upon the ground that the district court had made orders without jurisdiction, exceeded its authority in such orders, or whether, upon the ground that he had not done the acts charged. It was objected that the defendant had a right to insist upon both grounds of defense.

And, on page 170 in the opinion filed at the conclusion of the trial, the learned judge seems to make it a matter of complaint that the jurisdiction of his court was questioned by counsel for defendants, and this fact seems to be treated as an aggravation of their offense. Surely we have not arrived at the point in jurisprudence, where for counsel

sel to question the jurisdiction of a court in a respectful way ought to be charged as an offense against the client.

In conclusion, we beg to suggest that if, upon the facts and upon the decisions of this and other courts, the law as held by the bankruptcy court is so clear that any lawyer taking, and acting on a different view, ought to be sent to jail, the practice of the law has become a very dangerous occupation.

W. H. H. Miller,
W. M. Smith,
Attorneys for D. A. Sachs.

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JAMES H. McKENNEY,
Clerk.

— IN THE —

Supreme Court of the United States.

In re WILLIAM W. WATTS AND DAVID A. SACHS.

ON PETITION FOR WRIT OF HABEAS CORPUS.

BRIEF ON BEHALF OF FREDERICK D. CONNOR, RECEIVER IN BANKRUPTCY OF M. ZIER & CO., THE INLAND STEEL COMPANY, JOHN C. THURSTON AND JOHN DEY, PETITIONING CREDITORS, AND OTHER CREDITORS.

GEORGE H. HESTER,
WILLIAM WILHARTZ,
Attorneys for Receiver, et al.

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IN THE

Supreme Court of the United States.

In re WILLIAM W. WATTS
AND DAVID A. SACHS.

ON PETITION FOR WRITS OF HABEAS CORPUS.

BRIEF ON BEHALF OF FREDERICK D. CONNOR, RECEIVER IN BANKRUPTCY OF M. ZIER & CO., THE INLAND STEEL COMPANY, JOHN C. THURSTON AND JOHN DEY, PETITIONING CREDITORS, AND OTHER CREDITORS.

This being a proceeding of a criminal nature, prosecuted in the name of the Government against William W. Watts and D. A. Sachs, to which the Receiver in bankruptcy of the District Court and the creditors of M. Zier & Co. are not parties, we fully appreciate the favor of being permitted to file a brief in their behalf.

It is apparent that they have a vital interest in the determination of these causes. This is clearly revealed by the mere reading of the petitions that have been filed and the grounds upon which these petitioners seek relief. The proceedings in bankruptcy of the United States District Court, out of which arose these prosecutions for contempt, are at-

tacked as void. The jurisdiction of the Court and its right to act in respect to this property is denied and assaulted. If the Court had no jurisdiction to make the orders which these petitioners are alleged to have violated, then it has no right to retain this property or administer it in bankruptcy. Not only this, but the bankruptcy law itself is at stake; for it is sought by these petitioners to strip the Bankruptcy Court of its power to enforce the law. Every creditor, therefore, of an insolvent concern, who may, at any time hereafter, have an interest in the enforcement of the bankruptcy law, is an interested party here. If the position of these petitioners and their counsel is sustained by this Court, it is not intemperate to say that the practical effect will be to wipe out of existence the Act of Congress providing for a uniform system of bankruptcy and to permit the administration of insolvents' estates in the various State Courts under various State laws.

We, therefore, submit the following in support of the proceedings in the District Court, asserting our belief that all the orders made by the District Judge, including those in which these petitioners were sentenced, were wholly warranted and justified in law, and wholly appropriate to the facts that came before him.

STATEMENT.

A statement of the facts and history of these causes has been presented to this Court in the petitions for writs of *habeas corpus* and *certiorari* and in the briefs of counsel in support thereof. We can readily understand how the Court, upon the *ex parte* presentation of these statements, immediately issued the writs and released these petitioners. But, being familiar with the cases from their inception, we do not hesitate to say that both of these statements are wholly misleading, in that they contain but half the truth, and that, when the facts are fully known to the Court, it will be seen

that the conduct of the District Court was not only justifiable and legal, but eminently dignified and proper.

We believe that the following statement of facts will be found to be more nearly in accordance with the evidence given in the cause, the finding of the District Court and the history of the proceedings as shown by the record.

For some time prior to December 30, 1902, the corporation of M. Zier & Co., which was located at New Albany, Indiana, and engaged in the boiler manufacturing business, through the mismanagement of its Vice-president, M. Zier, became hopelessly involved and found itself owing $80,000 of debts and owning but a little over $30,000 of assets. Mr. M. Zier, who was in charge of the plant, and the active manager of the business affairs of the corporation, realizing that the firm could not continue business and must go into liquidation, for some time past, had been fraudulently drawing from the corporation's treasury, by means of padded payrolls, funds which he intended and afterwards did devote to the payment of preferences, fraudulent under the act of bankruptcy, to the extent of over $13,000. (Tr. of Ev. pp. 8 to 14 inclusive.) Previous to December 30, 1902, $3,100 of this money had been paid to Jos. T. Ryerson & Son, a corporation of Chicago, Illinois, and a large creditor of M. Zier & Co. On that day, M. Zier placed in the hands of his attorney, Charles L. Jewett, the sum of $9,600 and directed him to take all but $600 of it to the city of Chicago, and pay it over to the agent of his sister-in-law, Minnie M. Zier, who was also a stockholder and creditor of the firm. It is shown by the evidence and was found by the Court, that all of the parties connected with this firm knew of the insolvency of the concern; knew of the purpose of going into the State Court to obtain the appointment of a Receiver and of the purpose for which this money had been withdrawn and to which it was to be devoted. (R. p. 133). Obedient to these directions, Mr. Jewett

proceeded to Chicago and, on the 29th day of December, there met the agent of Mrs. Zier, paid over to him the sum of $9,000 and retained the other $600 of the amount given him by M. Zier as expenses and fees for services thereafter to be rendered the estate.

On the same day, Mr. Jewett, further acting under the direction of M. Zier, arranged with the firm of Ryerson & Son to come to the city of New Albany on the next day, and there apply for the appointment of a Receiver of the M. Zier & Company corporation. (Tr. of Ev. pp. 47 to 51 inclusive). It was also arranged at this meeting, in accordance with the wishes and direction of M. Zier, that the New Albany Trust Company, a concern in which Mr. C. L. Jewett and his brother, Mr. H. E. Jewett, owned a large and controlling interest, should be appointed Receiver.

As a consequence of this collusive (and, we think, fraudulent) agreement, the agent of Ryerson & Son, on the 30th day of December, 1902, went to the city of Louisville and there consulted with Mr. W. W. Watts, one of the petitioners herein, in regard to carrying out the plans arranged at Chicago the day before. Mr. H. E. Jewett was called to Louisville by telephone to meet these gentlemen and, after a consultation in Mr. Watts' law office on the subject, they proceeded to New Albany, arranged for a hearing before the Judge of the Floyd Circuit Court in chambers (the Court not then being in session), and filed a complaint on behalf of Ryerson & Son, asking for judgment in their favor and the appointment of a Receiver, the charges in the complaint being that M. Zier & Co. *was hopelessly insolvent* and was dissipating its property and assets. (Tr. of Ev., pp. 17 to 19, and pp. 26 to 29.) To this action, M. Zier, accompanied by his attorney, Mr. Jewett, waiving the issuing of all notice and summons, voluntarily and immediately appeared in person, and consented to and approved the appointment of the New Albany Trust Company as Receiver. The Trust Company immediately qualified and proceeded to administer the estate and to wind up the bankrupt's affairs, preparatory to selling the assets and distributing the proceeds among the creditors.

Subsequently to this time, a meeting of the creditors of M. Zier & Co. was called by the New Albany Trust Company as Receiver, by notices sent through the mail, to be held before the Floyd Circuit Court on the 24th day of January. This meeting was held in the presence of the Court, but was absolutely informal, and, so far as the creditors present were concerned, amounted to nothing more than a general discussion of the advisability of operating the plant or selling it out at once. None of the petitioning creditors in bankruptcy had filed their claims or any other pleading or paper in the case. There had been no sales of property. No dividends whatever had been paid by the Receiver and no money received by any claimant. (Tr. of Ev., pp. 28 to 31, inc.)

It appeared to be the aim of Ryerson & Son and some other creditors, who had received large preferences, to prevent this estate from reaching the Bankruptcy Court. With the view, apparently, of "anchoring" the administration of the estate in the State Court, Mr. Watts prepared an order and had it adopted by the Floyd Circuit Court, *enjoining all creditors from prosecuting their claims in any other Court or in any other way than by intervention in this proceeding in the Floyd Circuit Court.* (R., pp. 50 to 52, inc.)

On the 6th day of February, 1903, the Inland Steel Company, John C. Thurston and John Dey, doing business as the Dey Time Register Company, as petitioning creditors, filed in the United States District Court, at the city of New Albany, their petition in involuntary bankruptcy, to have M. Zier & Co. declared a bankrupt. It was alleged in this petition that the concern was hopelessly insolvent and that within four months next preceding the date of the filing of the petition, the said M. Zier & Co. had committed acts of bankruptcy by transferring to the firm of Jos. T. Ryerson & Son, of Chicago, and Minnie M. Zier, of Minneapolis, creditors of M. Zier & Co., certain portions of the property of said M. Zier & Co., with intent to prefer said creditors over and above the other creditors of said concern. It was further alleged in this petition that it was absolutely necessary, for the preservation of the estate of M. Zier & Co., and for the

benefit of all its creditors alike, that a Receiver in Bankruptcy be appointed at once to take charge of the affairs of said company, and a prayer to this effect followed. (R., p. 66.)

The Court did not act immediately upon this petition, but held the same under advisement and consideration for five days and until the 11th day of February, 1903. On this day, the said Inland Steel Company, one of the petitioning creditors, filed a further petition (R., Ex. B., p. 71), alleging that the New Albany Trust Company, Receiver of the State Court, was controlled by Henry E. Jewett, attorney for M. Zier & Company and Vice-president of said New Albany Trust Company; that the said Receiver had placed in charge of said plant, Michael Zier, who was wholly incompetent for said business and unfamiliar with the work essential to its safe conduct and that if said Receiver was permitted to remain in charge, it would result in injury and detriment to the said creditors of said M. Zier & Co., who were entitled to participate in said estate; that W. W. and J. R. Watts, the attorneys for Jos. T. Ryerson & Son, who procured the appointment of said New Albany Trust Company as Receiver, were acting as attorneys for said Receiver; that it was feared that said Receiver was friendly to Jos. T. Ryerson & Son, to the detriment of the creditors at large of said bankrupt; and that it was absolutely necessary for the preservation of said estate that a Receiver in Bankruptcy be appointed, for which relief they again prayed.

Still the District Court hesitated to act, and thereafter, on the 11th day of February, 1903, the Inland Steel Company filed an additional and supplemental petition, in which it alleged (under the terms of the amendment of the Bankruptcy Act, which was approved and in force February 5, 1903), the appointment by the Floyd Circuit Court of a Receiver for the property of said concern and that said Receiver immediately took charge of all of its property and was then operating the same in the interest of Jos. T. Ryerson & Son, and against the other creditors, and for the third time they prayed that a Receiver be appointed. (R., p. 75.)

Upon the filing of this third petition and after requiring

the petitioning creditors to execute to M. Zier & Co. a bond in the sum of $20,000, the Court appointed Frederick D. Connor as Receiver and directed in its order of appointment that he should take into his possession the sheet-iron and boiler manufacturing plant of said M. Zier & Co., together with all its other property. It was further ordered that the New Albany Trust Company should deliver up to said Receiver all of said property and effects of said M. Zier & Co. then in its possession and refrain from interfering in any way with such Receiver's possession. The Receiver, Mr. Connor, immediately qualified by giving bond as required by the Court in the sum of $10,000. (R., p. 74.)

On the 13th day of February, 1903, and before the Receiver of the District Court had made any demand for the property, upon learning of the appointment of said Connor as Receiver by the United States District Court, Mr. W. W. Watts, petitioner herein, proceeded from his home in Louisville, Kentucky, to the city of New Albany, and there, after a consultation in their office with Charles L. Jewett and Henry E. Jewett, attorneys, telephoned to the city of Indianapolis, asking the District Judge to restrain the actions of the Receiver appointed by him on the 11th, until he (Watts) could procure an order from the Floyd Circuit Court permitting him to do so and come to Indianapolis and present to him reasons why he should not have appointed a Receiver and why his order made therein should be annulled. This favor, requested by Mr. Watts, Judge Anderson (the District Judge) readily granted. He immediately caused the Receiver of this Court and the attorneys interested in the case to be notified to take no further steps until the hearing could be had on the questions to be suggested by Mr. Watts, on the 16th day of February, at Indianapolis. No further action was taken by the Receiver to obtain possession of the property except this; that with a view to observing that very comity and respect to which, it is so loudly proclaimed by counsel, the State Court was entitled, the Federal Receiver filed, in the cause pending in the State Court, a petition showing his appointment and embracing a certified copy of the order

appointing him. This petition was filed about 9 o'clock on the morning of Saturday, the 14th of February. (R. p. 173).

After procuring the above favor and concession from Judge Anderson, and after he had been apprised of the filing of the petition of Connor in the State Court and had read the same, on the morning of February 14th, Mr. Watts went before the Judge of the Floyd Circuit Court and filed a petition on behalf of the New Albany Trust Company as Receiver, reciting the fact of the filing of the petition in bankruptcy and the appointment of a Receiver by the Federal Court, *and prayed that each of the petitioning creditors, together with the United States Marshal, the Receiver of the District Court and the attorneys interested in the case, be enjoined and restrained from taking any further steps to secure the possession of this property and further prayed that they each be cited to show cause why they should not be punished for contempt for the acts already done.* (R. p. 41 to p. 49, inc.) Mr. Watts, at the same time, submitted an order covering these points, which he had prepared, and at his request it was adopted by the Judge of the Floyd Circuit Court without a single alteration, except that the names of the attorneys were stricken out therefrom. (R. p. 50 to p. 53, inc.).

After thus violating the courtesy and abusing the privilege granted by the Judge of the United States District Court, Mr. Watts, with Mr. Jewett, Vice-president of the New Albany Trust Company, Receiver, proceeded to Indianapolis, and for nearly two days, the 16th and 17th of February, argued before the Court against his right to appoint a Receiver or to take any steps in the bankruptcy proceedings to obtain possession of the property. At the conclusion of this argument, Judge Anderson announced that it was his opinion that the Bankruptcy Court had supreme and exclusive jurisdiction in the matter, and he asked Mr. Watts and Mr. Jewett if, in their judgment, it would not be best, in order to avoid a clash of jurisdiction, to voluntarily turn the property over to the United States Receiver. After considering the question for two hours over the noon adjournment, these gentlemen came into Court and each of them announced that

they agreed with the Court as to the advisability of turning this property over to the Receiver of the Bankruptcy Court. Mr. Watts at that time stated to the Court that he would do all in his power to see that the proceedings in the State Court of February 14th were stricken out and annulled, and that he would endeavor to have the State Court make an order directing them to deliver the property. (R. p. 137 and 138. Tr. of Ev., pp. 34-35.)

Leaving Indianapolis after this meeting, as Mr. Watts himself testified, the nearer he got to his home in Louisville, the more he thought he had made a mistake in agreeing to turn the property over. (Tr. of Ev., p. 176.) In this state of mind, the next day after his return, he procured his confidential friend, Mr. D. A. Sachs, to go with him to New Albany for the ostensible object of protecting him (Watts) against the wrath of the Judge of the Floyd Circuit Court, on account of doing what he had conceded was the right thing. As a matter of fact, this was, at most, but incidentally the purpose of their visits to New Albany during those days. The evidence shows, and the District Court so finds, that they were there for the purpose of avoiding the promise made to it, and to circumvent the turning of this property over to the Federal Receiver. (R., pp. 163, 164 and 165.) They talked with the Circuit Judge of calling out the State Militia to prevent the United States Court from getting the property. And even when they found that the New Albany Trust Company had voluntarily carried out its stipulation to the District Court, they set on foot the proceeding that afterwards resulted in the Federal Receiver being forcibly ejected from the property and the Receiver appointed on their application, taking possession. They met the Judge of the Floyd Circuit Court, on this and each succeeding day during that week, and consulted together on the subject in saloons, on the street and in the Judge's office. (Tr. of Ev., p. 116 to 138 inc.) At one of these meetings, it may be stated, at the joint suggestion of Mr. Sachs and Mr. Watts himself, he was cited by the Circuit Judge for con-

tempt for having made this agreement to turn over this property. The New Albany Trust Company was likewise cited for the same thing.

On the 19th day of February, upon presentation of a certified copy of his appointment; Mr. Connor as Receiver, in accordance with an order made by the District Court on the 17th, (R., pp. 77 and 78) demanded of the New Albany Trust Company possession of the property of M. Zier & Co. Thereupon Mr. H. E. Jewett, as Vice-president of the Receiver, delivered to Mr. Connor complete possession and control of all of the property and assets of the Zier & Co. corporation in the hands of the New Albany Trust Company as Receiver, excepting the cash on hand. Mr. Connor, as Receiver, immediately took complete charge and possession of the manufacturing plant and property in person and then placed it in the hands of a custodian. He retained possession until the 20th day of February, 1903, when a demand was made on him by Charles D. Kelso, who had been appointed in the place of the New Albany Trust Company, removed, of M. Zier & Co. by the Floyd Circuit Court, to deliver to him all of said property. Upon his refusal to comply with the demand, the Judge of the Floyd Circuit Court, who was waiting at his chambers at the court house in the City of New Albany, at the hour of 7:30 p. m. for the purpose, on said day issued a writ to the Sheriff of Floyd County, directing him to immediately take possession from said Connor of all the property of M. Zier & Co. and deliver the same over to Charles D. Kelso as Receiver. In obedience to this writ, the Sheriff did go to the plant, and there, in the night time, forcibly and violently ejected from the buildings and property of M. Zier & Co., the custodian placed there in charge of the same by Mr. Connor and drove him from the premises. Mr. Kelso then took possession and held it until the 26th day of Febru[illegible] when he again voluntarily delivered the same to Mr. C[illegible], who has ever since retained possession. (Trans. of Ev., pp. 6 to 13.)

It may also be stated in this connection, that on the 27th day of February, 1903, there was paid to Mr. Connor as Re-

ceiver, by Mr. C. L. Jewett, the said sum of $9,600, which had been placed in his hands to be paid to Minnie M. Zier under the fraudulent circumstances above set out. (Tr. of Ev. pp. 60-61). This money was in the custody of the Receiver of the State Court, whatever, therefore, becomes of the *other* property, this part of the estate, at least, would have to be administered in the Bankruptcy Court. So that, if the jurisdiction of the District Court in obtaining this property is denied, it will result in the strange and anomalous situation of part of the estate being administered in one Court and part in another.

POINTS AND AUTHORITIES.

All State laws for the administration of insolvents' estates and all actions and proceedings thereunder are suspended by the enactment of the general bankruptcy law.

In re Smith *et al.*, 92 Fed., 135.
Tua vs. Carriere, 117 U. S., 201-209.
In re Bruss-Ritter Co., 90 Fed., 651.
Lea *et al.* vs. George M. West Co., 91 Fed., 237.
In re Rouse Hazard & Co., 91 Fed., 96.
Lothrop vs. Highland Foundry Co., 128 Mass., 120.
Harmenter Mfg. Co. vs. Hamilton, 51 N. E., 529.
Harbough vs. Costello, 56 N. E., 363.
In re Gutwillig, 90 Fed., 475.

The jurisdiction of the Federal Courts over the administration of insolvent estate is exclusive and supreme.

In re Merchants Insurance Co., 6 N. B. R., 43.
In re Smith *et al.*, 92 Fed., 135.
Harbough vs. Costello *et al.*, 56 N. E., 363.
Watson vs. Bank, 11 N. B. R., 161.

The Bankruptcy Act of 1898 authorizes the District Court "to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of this act."

The jurisdiction of the bankruptcy court being supreme, it may properly, by summary process, obtain possession of property in the hands of an assignee or other officer of a State Court.

In re John A. Etheridge Furniture Co., 92 Fed., 329.
White vs. Schloerb, 178 U. S., 542.
Bryan vs. Bernheimer, 181 U. S., 188.
Mueller vs. Nugent, 184 U. S., 1.
In re Tune, 115 Fed., 906.
In re Green Pond R. Co., 13 N. B. R., 118, Fed. Cas. No. 5786.
In re Safe Deposit and Sav. Inst., 7 N. B. R., 392 Fed. Cas. No. 12211.
In re Washington Marine Ins. Co., 2 Ben., 292, Fed. Cas No. 17246.
In re Merchants Ins. Co., 3 Biss., 162, Fed. Cas. No. 9441.
In re National Life Ins. Co., 6 Biss., 25, Fed. Cas. No. 10,046.
In re Whipple, 6 Biss., 516, Fed. Cas. No. 17,512.
In re Smith *et al.*, 92 Fed., 135.
Clark vs. Larromore, 23 Sup. Court Rep., 363.

Summary proceedings are also authorized to take property from the hands of a *Receiver* of a State Court.

In re Merchants Ins. Co., 6 N. B. R., 43.
In re Lengert Wagon Co., 110 Fed., 927.
In re Stork Lumber Co., 114 Fed., 360.
In re Bruss-Ritter Co., 90 Fed., 651.
Platt vs. Archer, 9 Blackf., 559; Fed. Cas. No. 11,215.

The proceeding in the State Court for the appointment of a Receiver of M. Zier & Co., was, in substance, a voluntary assignment, or bankruptcy proceeding. Every asset of the insolvent was placed by it in the hands of the Receiver selected by it. The purpose was the distribution of these assets among all its creditors.

In re John A. Etheridge Furniture Co., 92 Fed., 329.
In re Storck Lumber Co., 114 Fed., 360.

The cases at bar do not involve either the question of property held by adverse claim, or that of a lien attaching more than four months previous to the bankruptcy proceedings. The following cases relied on by the petitioners are not, therefore, in point.

Peck vs. Jenness, 7 How., 625.

Louisville Trust Co. vs. Commingore, 184 U. S., 18.

Metcalf vs. Barker, 23 Sup. Court Rep., 363.

The State Court having no jurisdiction whatever after the filing of the petition in bankruptcy, it had no power to hear and determine the question of whether or not it would relinquish the property. It became its duty to do so at once, upon being informed of the proceedings in the United States Court, and every step taken thereafter with reference to the property and its custody was *coram non judice.*

If a Receiver is appointed by a Federal Court and actually takes possession of the property, possession will not be yielded to a Receiver subsequently appointed by a State Court, although the suit in the State Court was commenced before that in the Federal Court.

East Tenn., Virginia and G. R. Co. vs. A. & T. R. Co., 49, Fed. 608.

Central Trust Co. of N. Y. vs. Chattanooga R. Co., 69 Fed., 950.

Where a State Court has no jurisdiction over property and loses the actual possession therof to the Federal Court, there remains no possession by the State Court, either actual or constructive.

The Willamette Valley, 62 Fed., 293.

The Willamette Valley, (C. C. A.) 66 Fed., 565.

Moran vs. Sturges, 154 U. S., 256-293.

Where there is neither actual nor constructive possession there can be no obstacle to proceeding summarily, and an action thus taken can not be invalidated by relation.

Moran vs. Sturges, 154 U. S., 256-284.

The Bankruptcy Court having been given voluntary and peaceable possession, the question of comity between the Courts is not involved, except as it applies to the action of the State Court in retaking the property. It is a question of the supremacy of the Constitution and laws of the United States.

In re Tune, 115 Fed., 906.

East Tenn., etc., R. Co. vs. A. & T. R. Co., 69 Fed., 950.

Where property is in the custody of the Bankruptcy Court, no other Court and no person acting under any process from any other Court, can, without the permission of the Bankruptcy Court, interfere with it; and, to so interfere is a contempt of the Bankruptcy Court.

In re Vogle, 7 Blackford, 18-20.

Moran vs. Sturges, 154 U. S., 256.

Freeman vs. Howe *et al.*, 24 How., 450-459.

ARGUMENT.

The comprehensive review of the law and facts in these cases in the opinion of the District Court leaves very little to be added here. However, at the risk of repetition, we desire to try to emphasize some of the points brought out and to call attention to some other phases of law and facts, as they affect the rights of the petitioning creditors in the bankruptcy proceedings below.

The power of Congress to pass laws providing for a uniform system of bankruptcy throughout the United States is warranted by express provision in the Constitution. Art. 1, Clause 8, provides:

> "The Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcy throughout the United States."

In accordance with this authority, Congress has passed such a law. It is a familiar rule, as observed by Judge Anderson in his opinion in this case, that when ever, by the exercise of express constitutional authority, Congress occupies a field of the law, it does so to the exclusion of the legislative and judicial powers of the different States. It seems clear, therefore, that the enactment of the general bankruptcy law has suspended all State laws for the administration of insolvents' estates, and all actions and proceedings thereunder. And this principle is strongly upheld by the decisions of this Court and other Federal Courts and also, in the very strongest of terms, by the Supreme Courts of several of the States.

Referring to the insolvent laws of the State of Louisiana, this Court, in the case of Tua vs. Carriere, 117 U. S., 201 at page 210 say:

> "If those laws had then been enacted for the first time, they would, so far as inconsistent with the bankruptcy act have been inoperative while that act remained in force, but upon its repeal would have come into operation."

The Supreme Court of the State of Illinois, in the case of Harbough vs. Costello, *et al.*, 56 N. E., 363, holds, that even where no proceedings in bankruptcy have been instituted, the possession by an assignee in voluntary assignment proceedings is without legal authority.

The Court by Magruder, J., say:

> "It is provided in section 8 of the first article of the Constitution of the United States, that 'Congress shall have power . . . to establish . . . uniform laws on the subject of the bankruptcies throughout the United States.' In interpreting this provision of the Constitution, it has been held that the power to pass insolvent or bankrupt laws was not thereby taken away from the States until Congress itself should ex-

ercise the power thereby conferred by the passage of the bankrupt law. When, however, a bankrupt law is passed by Congress, any State law upon the subject which may exist is suspended in its operation. As soon as a national bankruptcy act goes into effect, State insolvency laws are suspended and become inoperative, at least so far as they conflict with the acts of Congress upon the subject, and so far as they embrace the same subject matter as is embraced in the act of Congress."

Citing from Black on Bankruptcy, the Court, in the above case, further says:

"The passage of a national bankruptcy law by Congress renders it supreme. The State laws in force must yield to it, and can no longer operate upon persons or cases within the purview of the Federal statutes. The latter does not, indeed, repeal or destroy the State laws on the same subject, but it suspends their operation. If the State law and the Federal Act operate upon the same subject matter, upon the same property, upon the same rights, and upon the same persons, creditors as well as debtors, or may so operate, they can not go together without direct and positive collision and in such a case the Federal enactment suspends or supersedes the State law."

In re Bruss-Ritter Co., 90 Fed., 61, the same point is decided. In this case it is said:

"The power of Congress to enact a general bankruptcy statute is secured by constitutional provision. In the absence of such congressional enactment, the States are free to provide for insolvency relief of limited extent, but when Congress exercises its authority by a general enactment, all such action is suspend-

ed from such time, and subject only to such limitations as may be prescribed in the Act. Tua vs. Carriere, 117 U. S., 201-209."

As remarked in Platt vs. Archer, 9 Blackford 559, (Fed. Cas. 11,213) this authority of Courts "is paramount and exclusive and so is the jurisdiction of the District Court thereunder."

Other cases sustaining the same doctrine are:
Lea *et al.* vs. George M. West Co., 91 Fed., 237.
In re Bruss-Hazard & Co., 91 Fed., 96.
Lothrop vs. Highland Foundry Co., 128 Mass., 120.
Parmenter Mfg. Co. vs. Hamilton 51 N. E., 529.

It can not be doubted, furthermore, that the jurisdiction of the Federal Courts over the administration of insolvent estates when once invoked, is exclusive and supreme. If this were not so, the purpose and intent of Congress in the passage of the bankruptcy law, to establish a uniform system of bankruptcy throughout the United States, would be nullified.

In the case entitled *In re* Merchants Insurance Co., 6 N. B. R., 34, decided by Judge Blodgett, formerly of the seventh Circuit, a petition was filed to have the Insurance Co. declared a bankrupt. Previous to this, suit had been brought in the State Court of Illinois to dissolve the corporation and a Receiver had been appointed in that suit prior to the institution of the proceedings in involuntary bankruptcy. The question arose whether or not the Receiver of the bankruptcy Court was entitled to the possession of the property and to administer it, notwithstanding it was then in the possession of the Receiver of the State Court. Judge Blodgett said:

"The object and intent of the general bankrupt law is to place the administration of the affairs of insolvent persons and corporations exclusive under the jurisdiction of the Federal Courts of bankruptcy; and the enactment of the general bankruptcy law, now in

> force, suspended all actions and proceedings under State insolvent laws. But, it is objected that the proceedings in the State Court here complained of, being in accordance with a general statute of this State and part of the organic law by which the respondent exists, and being predicated mainly upon the reserved right of the State to protect its citizens against irresponsible insurance companies, and the State Court having acquired jurisdiction of the parties and subject matter, this Court can not now interfere as a bankrupt Court to take charge of and administer the assets in question, although the insolvency of the respondent is fully conceded. It seems enough to suggest in answer to this position, that, if correct, any State Court could effectually defeat the operation of the bankrupt law passed by Congress by simply providing that any person or corporation if deemed insolvent or incapable of doing business by a State officer, might, under the power of exercising and enforcing police regulations or enactments by the States be wound up and its assets administered upon in the State Courts, notwithstanding such person or corporation might be insolvent and guilty of all the acts of bankruptcy provided for in the general bankrupt law."

In the case of John L. Watson vs. the Citizens' Saving Bank of South Carolina, 11 N. B. R., 161, it is said:

> "We are of the opinion that the jurisdiction of the United States Courts in bankruptcy is an exclusive jurisdiction. That although the State Courts had jurisdiction under their statute, to settle and arrange the affairs and distribute the assets of an insolvent corporation, their jurisdiction is at an end the moment the corporation is adjudicated a bankrupt by the District Court."

It has even been held that where voluntary general assignments for the benefit of creditors are made in conformity with laws which are not treated as "insolvent laws" the proceedings are voidable by the trustee in bankruptcy. *In re* Gutwillig, 90 Fed., 475, (Sou. Dis. of N. Y.), it is said:

> "Voluntary general assignments for the benefit of creditors made in conformity with the laws of the State of New York, though said laws are not treated as 'insolvent laws, within the meaning of the last paragraph of the act of 1898, are voidable by the trustee of the debtor in bankruptcy if made within four months of the adjudication because *incompatible with the purpose and policy of the bankrupt law*, and the rights of creditors thereunder to the appointment of the trustee and the supervision of the assets of bankruptcy; because in fraud of creditors within section 70 of the Act, as the assignment deprives creditors of the important advantages secured to them under the act of 1898; and because if not voidable, the clause of section 3 making such an assignment *ipso facto* an act of bankruptcy will be practically nullified and rendered of no use to creditors."

We may observe in passing, that it appears from this authority, that it is not material as to what the proceeding in the State Court is denominated, whether it be called a general assignment or a receivership, if, as a matter of fact, it is for the purpose of collecting and distributing the assets of an insolvent debtor among his creditors. Under the present law, as changed by the amendment of Feb. 5, 1903, the appointment of a Receiver by the Floyd Circuit Court was an act of bankruptcy, and it was so alleged and set out in the petition. In effect it was the selection by M. Zier & Co. of a trustee for its creditors, notwithstanding the bankruptcy law gives the right to select the trustee to the creditors themselves.

SUMMARY PROCESS.

It must be conceded, in view of the foregoing authorities, (as we understand it is by the learned counsel opposing) that there is no question here of concurrent or co-ordinate jurisdiction between State and Federal Courts. A more difficult situation would be presented if this were not. But it is too well settled to admit of the slightest argument, that the moment the proceedings in bankruptcy were filed by these creditors, on February 6th, 1903, the sole and exclusive jurisdiction over, and right to administer, the property of M. Zier and Company, was lodged in the District Court of Indiana and the Floyd Circuit Court was stripped of all jurisdiction it ever had over it. The jurisdiction of the State Court was ousted; the jurisdiction of the Bankruptcy Court was rendered sole, exclusive and supreme.

But it is contended that orderly procedure and the rule of comity required the Receiver of the Bankruptcy Court to go into the State Court and obtain an order for the delivery of this property; that the suit for a Receiver being rightfully brought in the State Court, that Court retained jurisdiction until it decided in a proper way to relinquish it; that the possession of the Federal Receiver was wrongfully taken, it being without leave of the State Court.

Let us see what state of facts this principle of comity is sought to be applied to? It is established by the evidence and conceded by the parties that this property *was voluntarily delivered over to the United States District Court, by the Receiver of the State Court, without the slightest force or interference.* The evidence shows that Henry E. Jewett, the Vice-president of the New Albany Trust Company, Receiver, and Mr. Watts were convinced at the hearing before the District Court on February 16th and 17th, that the right to the possession of the property was in the District Court.

The evidence further shows that, voluntarily, and with nothing more than a demand, the property was delivered into the possession of the Receiver of that Court.

Mr. Jewett's testimony on this point is without contradiction. (Trans. of Ev., pp. 34 and 35.)

Q. But as the result of that you did come to Indianapolis?

A. Yes.

Q. And you were here on Monday and Tuesday?

A. Monday and Tuesday.

Q. The question of jurisdiction of the courts was argued to this court?

A. Argued to this Court all Monday afternoon.

Q. Any part of Tuesday?

A. Yes, Tuesday morning.

Q. Was Mr. Hester here representing the petitioning creditors?

A. Hester and some other gentlemen; I don't remember his name, of Chicago.

Q. And after that argument you reached a conclusion about the matter, did you?

A. Yes, sir.

Q. And that was that you were to turn over the property to Mr. Connor, Receiver?

A. Yes, sir.

Q. You speaking for the Receiver, you representing the trust company, and Mr. Watts, your attorney also?

A. Yes.

Q. Before leaving here, it was stated by both you and Mr. Watts that you would return to New Albany and turn the property over to Mr. Connor, the Receiver appointed by this Court?

A. He stated that distinctly, and so did I.

Mr. Connor's testimony, also uncontradicted, is as follows (Trans., pp. 4 and 5):

A. After that hearing, I think on the 19th of February, I received a copy of my original order of appointment, with instructions to proceed to the Trust Company and demand that the property be turned over to me. Subsequent to that, however, I had a notice that some arrangement had been made here by which they would turn the property over to me on the 15th or 16th—the 16th I think it was.

Q. You may state whether or not you had prior to that time filed a petition in the Circuit Court of Floyd County to have the property turned over to you?

A. I had.

Q. You had filed that?

A. Yes, sir.

Q. Was that prior to the arrangement made to have a further argument of the question here in this Court?

A. I think it was.

Q. Do you know what was done on your petition?

A. No, I do not. I do not think any action was taken on it. I did not get any order.

Q. You did not get any notice of any action?

A. No, sir.

Q. After that, you may go on and tell what you did about making demand on the Trust Company and whom you saw and what you saw?

A. On the 19th of February, about nine o'clock in the morning, I think, I went to the Trust Company's office and presented a copy of my original order that I received from this Court, from the clerk, to the Secretary of the Trust Company, Fred. Sauer, and demanded the property. He stated that the Vice-president, Mr. Jewett, was not present, but would be in shortly and that he would act upon the matter. I waited there some time and Mr. Jewett came in and I demanded of him the property, and he handed me a document he had received, a petition that he had made to the Floyd Circuit Court and on that a written statement to me, asking me if I could not delay the matter, that he had laid it before the Judge and the Judge had said orally, that he would like for him to hold it in his hands, that he would like for him

to hold it in his hands until he could render his account to that Court, which they would make out the next day or shortly, but if I insisted, that he would turn it, the property, over to me as he had agreed to do in this Court. I insisted and he turned it over to me—gave me the keys.

Q. What he gave you there was the keys to the plant?

A. Yes, sir, the keys to the plant.

Q. If you know, what did that give you access to?

A. That gave me access to the building, the enclosure out there, the property of the plant, and the office books and safe, that was all.

Q. That was all that was turned over to you there at the Trust Company office?

A. Yes, sir.

Q. Just the keys to the plant?

A. Yes, sir.

Q. About what time in the day was that?

A. That was about half-past ten in the morning.

Q. Of what day?

A. 19th.

Q. Do you remember what day of the week that was?

A. I think it was on Thursday.

Q. What did you do after receiving the keys about going to the place and going into the plant, if anything?

A. I took a gentleman named Norton, Mr. Joseph Norton, up there and put him in charge of it as custodian, unlocked the place and took him in and gave him the keys to the front door and told him to take charge of it for me.

Q. That was on Thursday forenoon, you think?

A. Yes, sir.

Q. During that day did your man that you put in charge remain at the place?

A. Yes, sir.

Not only this, but even after it was again violently seized by Kelso, the second Receiver, under the order of the State Court, it was again, voluntarily and without even a request, delivered to the Receiver of the Federal Court (Trans., p. 7).

This being the manner in which the District Court acquired this property, it is difficult to see how the question of comity can be brought into the case. It might be suggested, however, in this connection, that if this rule of comity and orderly procedure obtained at all, it was grossly violated by the State Court when it forcibly, violently and in the night time, retook this property, without the consent or order of the Bankruptcy Court. It is a poor rule that works but one way.

We deny the assertion that this property came into the hands of the Federal Court as a result of threats and intimidation on the part of the District Judge. On the contrary, the record shows that he was extremely patient with these men. They were not, as alleged, "categorically" asked if they would give up this property, under the threat that if they did not do so they would suffer some punishment. For the better part of two days on the 16th and 17th of February, they were allowed, by the District Judge, to argue before him the question of the right of the District Court to act in the matter. Then, after they had admitted that he had exclusive jurisdiction over the property, they were asked whether they would do what they could to avoid an unseemly clash between the two Courts, and to this each of them voluntarily agreed. The finding and order of the Court covering this part of the proceedings, is found on pages 77 and 78 of Exhibit "B" of the record, and reads as follows:

> "This cause coming on to be heard upon the petition of Frederick D. Connor, filed herein on the 16th day of February, A. D., 1903, for the instruction of the Court concerning the property and assets of said M. Zier and Company which are now in the possession of the New Albany Trust Company as Receiver of the Floyd Circuit Court, in a suit therein pending against said M. Zier and Company, because of their insolvency; and the petitioning creditors in this cause and said Connor, receiver as aforesaid, being now present and represented by George H. Hester and William Wil-

hartz, their solicitors, and said New Albany Trust Company, receiver as aforesaid, being now present and represented by Henry E. Jewett, its Vice-president, and by William W. Watts, its solicitor, and after argument by counsel, the said New Albany Trust Company, as receiver of the Floyd Circuit Court, by its said Vice-president having voluntarily offered and agreed, by and with the consent and approval of said William W. Watts, its solicitor, in open court, to surrender full and immediate possession and control of the property and assets of said M. Zier & Company in its possession or under its control as Receiver of the Floyd Circuit Court, to said Connor, as receiver of this Court upon the presentation by him to said New Albany Trust Company of a certified copy of the order for his appointment as receiver heretofore made by the Court. It is now hereby ordered by the Court that said Connor, receiver as aforesaid, forthwith present a certified copy of the order for his appointment as such receiver to said New Albany Trust Company, and immediately thereupon take full possession and control of the property and assets of said M. Zier & Company that are now in the possession or under the control of said New Albany Trust Company as Receiver of the Floyd Circuit Court."

It is said that the District Judge threatened to go to New Albany with a club and that the surrender of this property was coerced by this threat. Even if this be true, if these men (Messrs. Jewett and Watts) believed that the State Court had jurisdiction to retain the possession of this property, there was nothing in the statement to coerce them to give it up. If the District Court was wrong, they had ample protection in the same right of appeal to review its actions they are now exercising. It was to be presumed by them that any erroneous action of the District Court would be reversed by the higher courts. On the other hand, if the District Judge was right in assuming jurisdiction over this property,

and if the law made it his duty to protect the creditors of this bankrupt concern, by taking summary possession of this property, then it was unquestionably his further duty to use whatever force was necessary to carry out his orders and decrees, even though it extended, figuratively speaking, to "the use of a club." This is not the first instance in which Courts have found it necessary to use a club—to employ force—to execute their judgments. It would have been a sad circumstance indeed, if the District Judge believed it was his duty to take summary action to protect these creditors, and then had hesitated because of some other Court's unfounded claim to jurisdiction.

CONSTRUCTIVE POSSESSION.

But granting, for the argument, that it was by means of force or threats that the Bankruptcy Court obtained this property out of the hands of the State Court, and that the Receiver of that Court had no right to turn it over, how does this affect the legality of the possession of the Federal Court? The position of counsel for petitioners, as we understand it, is that under the circumstances, the State Court still had constructive possession of the property and the right to retake it. It is insisted that because of this constructive possession of the State Court, notwithstanding the supreme and exclusive right to the property was in the Bankruptcy Court, the latter could not obtain legal possession except by first applying to the State Court in accordance with the rules of comity and allowing that Court to determine the question of jurisdiction.

It is difficult to see how "constructive possession" by one Court, having *no* "right of possession" can be maintained where there is "actual possession" by a Court that unquestionably has the exclusive "right of possession."

The Willamette Valley, 62 Fed., 2, 393.

The Willamette Valley (C. C. A.), 66 Fed., 565.

Moran vs. Sturgis, 154 U. S., 156-283.

In the Willamette Valley, *supra*, the Receiver had been appointed by the order of the State Court for a steamship and was engaged in its operation. A libel *in rem* was filed in the Federal Court in California, the vessel forcibly seized by the Marshal in the port of San Francisco, and the Receiver of the State Court forcibly ejected. It was held by the District Court (and affirmed by the Court of Appeals) that there being no jurisdiction in the State Court beyond its territorial limits, there was no possession in the State Court, either actual or constructive, after the vessel passed the Oregon State line and that therefore the seizure was lawful.

The above reason is most strongly applicable to the case at bar. Here, the moment the proceedings in bankruptcy were filed the State Court's jurisdiction was terminated and its Receiver became a mere bailee. By turning over the property to one who had the *right of possession*, it did not defeat any of the rights of the State Court.

In the case of Moran vs. Sturgis, 154 U. S., 256, at page 283, it is said on the same subject:

> "As between two Courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject matter in controversy, the Court which first obtains jurisdiction is entitled to retain it without interference, and can not be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession, may for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, *yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken can not be invalidated by relation.*"

RECEIVERSHIP OF STATE COURT FRAUDULENT.

It is familiar law, that all proceedings, orders and judgments of a Court which are obtained through fraud, are not only voidable but void *ab initio*. In Black on Judgments, section 293, quoting from Smith vs. Cuyler, 78 Ga., 654, the author says:

> "A collusive judgment is open to attack whenever and wherever it may come in conflict with the rights or the interest of third persons fraud is not a thing that can stand, even when veiled in a judgment."

If, therefore, the receivership in the Floyd Circuit Court was brought about by a collusive arrangement between M. Zier & Co., the defendant and Jos. T. Ryerson the plaintiff, to fraudulently confer on Ryerson & Son and Minnie M. Zier, some advantage over the other creditors of M. Zier & Co., and for the purpose of preventing the creditors from prosecuting their claims in the bankrupt Court, it can not be said that the Floyd Circuit Court *rightfully* acquired this property.

The District Court found that this was a fraudulent proceeding. (R. p. 134.) And the evidence fully justified this conclusion. (Trans., pp. 16 to 26, inc.) It was not the appointment of a Receiver under the equity powers of the Court to preserve property *pendente lite*. The ground alleged for the appointment in the complaint of Ryerson & Son was the insolvency of M. Zier & Co. The estate, as shown by the subsequent proceedings, was to be settled and distributed among the creditors. And this was all done *with the knowledge of all parties that over $13,000 had been paid out by the insolvent, within but a few days before the application was made*, with the object of wrongfully preferring the creditors who brought the suit and a near relative of the defendant. We say, then, that this proceeding *did not make the possession of the State Court rightful*, and that it has not lost any rightful possession.

BANKRUPTCY COURT MAY PROCEED SUMMARILY.

As the point is raised by the petitions herein, we assert, as a proposition of law, that the District Court *did* have power, after the filing of the petition in voluntary bankruptcy, to take the propery of M. Zier & Co. from the possession of the Receiver of the State Court, by summary process. This, we think, is fully sustained by the great weight of authority among the decisions of the District and Circuit Courts of the United States and those of this Court.

In re Smith *et. al.*, 92 Fed., 135, Judge Baker, formerly Judge of the District Court of Indiana, held, that where property was in the hands of a trustee under a voluntary assignment and was *in custodia legis*, it was proper to make an order summarily requiring the assignee to turn the property over to the Receiver appointed by the Bankruptcy Court. Judge Baker, in so holding, says:

> "No question of concurrent jurisdiction, or of the conflict of jurisdiction can possibly arise. The jurisdiction of the Bankruptcy Court is supreme, it is exclusive, and the acts of the State Courts are unauthorized and void, because jurisdiction over the person and estate of a bankrupt is drawn to, and vested exclusively in, this Court by the adjudication of bankruptcy."

So it is held *In Re* John A. Etheridge Furniture Co., 92 Fed., 329, by Judge Barr, of the District Court of Kentucky, wherein a summary order was granted upon petition of the Receiver in bankruptcy requiring the assignee of the State Court to turn the property over to the Receiver of the Federal Court. Judge Barr said:

> "Sub-section B of Section 71, provides: 'Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.'

> This would clearly indicate that proceedings commenced after the passage of the bankrupt act can not be effectual to prevent the administration of a bankrupt's estate in bankruptcy. To allow the bankrupt to select the trustee to administer upon his estate, instead of the creditors, as provided by the bankrupt act, or to allow the State Court to take jurisdiction of the estate of a bankrupt, and administer and distribute it, would effectually destroy the efficiency of any bankrupt act that might be enacted by Congress, and thus effectually destroy the power granted to Congress to pass a bankrupt act."

A very instructive case on this subject is that of *In Re* Tune, 155 Fed., 903. Here logs were in the possession of a constable under execution issued by a Justice of the Peace. Voluntary bankruptcy proceedings were commenced and a Receiver appointed. The District Court issued an injunction forbidding the prosecution of the attachment suit in the Justice's Court, restrained the constable from making any sale of the property and required it to be turned over to the Receiver in bankruptcy. The Court said, on page 916:

> "It is said that comity prevents one Court from interfering with property in the possession of another Court. This is a wise and salutary rule repeatedly enforced by the Supreme Court of the United States and respected by all lovers of law and order. No one bows to the rule more profoundly than does the writer of this opinion. *But the question is not one of comity or of concurrent jurisdiction. It is a question of the supremacy of the Constitution and laws of the United States* to which State and Federal Courts alike must bow. It is no new thing in our jurisprudence for a State Court which had concurrent jurisdiction of the subject matter with the Federal Court and first obtained jurisdiction, to lose that jurisdiction and have that jurisdiction by operation of 'the supreme law of the

land' vested exclusively in the Federal Court, which enforces the transfer of the *res* into its own custody. Our removal laws are familiar instances of the loss of jurisdiction by one Court after that Court has acquired such jurisdiction and the gain of its jurisdiction by another Court. The sections of the act cited inevitably give the District Courts of the United States the exclusive jurisdiction to administer the estate of an insolvent as against liens and attachments acquired against insolvents by legal proceedings, at any time within four months prior to the filing of the petition with exceptions named not here material if he had been adjudged bankrupt."

The most recent judicial expressions on the subject of summary process by Courts of Bankruptcy, in the opinions of this Court, have been to the same effect. There are but two exceptions to this rule laid down in the later decisions of this Court, but neither of them is applicable to the facts in this cause. They are: First—where the possession is held under a claim of title adverse to the bankrupt estate. Second—where the claim is under a lien which attached more than four months prior to the filing of the petition in bankruptcy.

In the case of White v. Schloerb, 178 U. S., 542, after adjudication in bankruptcy, an action in replevin was brought in the State Court against the bankrupt, to recover property claimed by the bankrupt at the time of the adjudication and then in the possession of the referee in bankruptcy. The District Court sitting in bankruptcy was held, under these circumstances, to have jurisdiction, by summary proceedings, to compel the return of the property seized. In the course of the opinion by Mr. Justice Gray, it is said:

> "The questions certified, concern not the trial of the title to these goods, but the judicial custody and lawful possession of them. . . . At the date of this adjudication in bankruptcy by the District Court of the United States, the goods were in the store of bank-

rupts, and in their actual possession, and were claimed by them as their property. On the same date, that Court referred the case to a referee in bankruptcy and by his direction the entrance to the store was locked. The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in custody of a Court of the United States, they could not be taken out of that custody upon any process from the State Court."

"So far as regards this point, the decision of this Court in Freeman v. Howe, 4 Fed., 450, more than covers the case. It was there adjudged that property taken and held by a marshal on a writ of attachment from a Court of the United States, directing him to attach the property of one person, could not be taken from his possession on a writ of replevin from a State Court in behalf of another person who claimed the attached property as his own." . . .

"Not going beyond what the decision of the case before us requires, we are of the opinion that the Judge of the Court of Bankruptcy was authorized to compel persons who had forcibly and unlawfully seized and taken out of the judicial custody of that Court property which had lawfully come into his possession as part of the bankrupt's property, to restore that property to its custody; and, therefore, our answer to the first question must be 'the District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized.'"

In Bryan v. Bernheimer, 181 U. S., 188, there was a summary petition to the District Court sitting in bankruptcy for an order on the marshal to take possession of the property of the bankrupt, which was then in the hands of a third party. A general assignment was made by one Abraham of his property consisting of a stock of goods to one Davidson, who had the assignment recorded, filed an inventory and

took possession of the property. Nine days afterwards, a petition in involutary bankruptcy was filed against Abraham, and on December 12, 1898, he was declared a bankrupt. On the same day the petitioning creditors presented to the District Court a petition showing that the assignee was disposing of the property and asking that an order directing the marshal to take the property then in the assignee's possession. This was done. The petitioning creditors then filed another petition showing that the assignee had turned over to one Bernheimer the stock of goods worth about $10,000, with knowledge on the part of Bernheimer of the proceedings in bankruptcy. A summary order was issued by the Court against Bernheimer to turn over this property to the Receiver of the Bankruptcy Court.

In the opinion of the Court, on page 195, it is said:

> "The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee, a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court or of the assignee, to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that, as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take pos-

session of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purposes of the writ. There is, therefore, no such limitation, expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant, wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee, when appointed, as a sufficient reason for failing to take possession of it. Sharp v. Doyle, 102 U. S., 686, 689, 690. A like decision was made in Feibelman v. Packard, 109 U. S., 421."

A still later decision of this Court on the right of the Bankruptcy Court to recover property from the hands of third persons by summary proceedings is found in the case of Mueller v. Nugent, 184 U. S., 1. In this case, after Nugent was declared a bankrupt, an injunction was issued against his son, William T. Nugent, to restore assets of the estate amounting to $14,435.45. Afterwards he was ordered to pay said sum to the trustee in bankruptcy. He failed to do this, was adjudged in contempt of Court and was committed to prison by the District Court until he should pay to the trustee said sum of money. After reviewing and approving the cases of White v. Schloerb and Bryan v. Bernheimer, *supra*, and after criticising the holding in the case of Bardes v. Hawarden Bank, *supra*, this Court reversed the Circuit Court of Appeals and held, that it was competent to deal with Nu-

gent in a summary way by committing him to prison for contempt, until he should pay over the money in his possession belonging to the bankrupt.

The very latest expression of this Court on the subject is in the case of Clark v. Larramore, 23 Sup. Court Rep., 363, decided Feb. 23, 1903. In this case the right of a District Court sitting in bankruptcy to issue summary process to obtain possession of property in the hands of an officer of the State Court, is reaffirmed. A stock of goods belonging to the insolvent was levied upon and sold by the sheriff under an execution issued out of the Supreme Court of the State of New York. Afterwards, and before a sheriff had returned the execution or paid the money, a petition in involuntary bankruptcy against the debtor was filed in the United States District Court for the Southern District of New York and an order made by the District Judge restraining the sheriff from paying the money to Clark. The debtor was afterward adjudged a bankrupt and a further order was entered by the District Judge directing the sheriff to pay the money to the trustee in bankruptcy. The Court of Appeals decided that the District Court had this power and that judgment was affirmed by this Court.

The learned counsel for petitioners rely wholly for the support of their position on cases, all of which come under one or the other of the exceptions hereinbefore mentioned, namely: Where the property sought to be obtained by the District Court is held under an adverse claim of title; or, where it is held under a lien which attached more than four months prior to the bankruptcy proceedings.

The case of Peck v. Jenness, 7 How., 611, under the bankruptcy act of 1841 was in force, and decided only that where there was a claim to property *adverse* to the title of the estate involved, the District Court did not have the power to summarily take the property into its own jurisdiction.

The case of Bardes v. The Bank, 178 U. S., 524, held that the District Courts, as such, had no jurisdiction over a suit brought by a trustee to recover property from a stranger to the proceedings, held adversely by him, unless by his consent.

This case is no longer the law. It is made ineffective by the amendment of 1903 which confers jurisdiction in actions of this character concurrently on the District and State Courts.

The case of Eyster v. Gaff, 91 U. S., 521, decided that where the party proceeded against was an *adverse claimant*, in the broad sense of the words, he should not be asked to respond to a petition, or order to show cause, or motion, issued summarily by the District Court. This decision was under the law of 1867.

The case of Metcalf v. Barker, 23 Sup. Court Rep., 67, decided Dec. 1, 1902, and so strongly relied on by the learned counsel for the petitioners, is likewise not in point here. The question decided by the Court in that case was, that, where a lien had attached, under a judgment of the State Court, to the bankrupt's property more than four months previous to the commencement of the proceedings in bankruptcy, under the provisions of section 67f of the Act of 1898, it should remain in full force and effect. It is admitted that there is no question of prior lien in the case at bar. This case has since received some consideration by this Court, in the case of Clark v. Larramore, *supra*, in the following language by Mr. Justice Brewer:

> "The contention of the petitioner is that the sheriff having sold the goods levied on before the filing of the petition in bankruptcy, the proceeds of the sale was not the property of the plaintiff in execution and not of the bankrupt at the time of an adjudication and a trustee therefore has no title to the sale.'
>
> "This contention can not be sustained. The judgment in favor of petitioner against Kenney was not like that of Metcalf Bros. v. Barker, 187 U. S., 165, only giving the effect to a lien theretofore existing, but one which with the levy of an execution issued thereon created a lien; and as judgment, execution, and levy were all made within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on adjudication in bankruptcy."

Further on in the opinion, it is said:

> "A different question might have arisen if the writ had been fully executed by the payment to the execution creditor, whether the bankruptcy proceedings would so far effect the judgment and execution and that which was done under them as to justify a recovery by the trustee in bankruptcy for the execution creditor as a question not before us, may depend on many other considerations. It is enough now to hold that the bankruptcy proceedings seized upon the writ of execution while it was still unexecuted and released the property which was held under it from the claim of the execution creditor."

The case referred to by counsel for petitioners of the Louisville Trust Company v. Commingore, 184 U. S., 18, is also a case involving an *adverse* claim. The general assignee in this case was held not to be strictly an assignee or agent of the Company, but rather an individual having acquired title lawfully and without notice and he was constructively, if not actually, *an adverse claimant.*

We think, therefore, that the chain of precedents supplied by the Supreme Court in the cases of White v. Schloerb, Bryan v. Bernheimer and Mueller v. Nugent, and Clark v. Larramore, settle beyond question the doctrine that summary process may be issued by a bankruptcy Court, irrespective of the amendment of 1903, under all circumstances, except where there is a claim of adverse interest, or where there is involved the enforcement of a lien which attached more than four months prior to the adjudication in bankruptcy. And now since the amendment of 1903, which gives the District Court the right to try preferences and adverse claims by a plenary suit, it seems that even the question of adverse claim is eliminated as an exception to the right to exercise this power.

SUMMARY ACTION AGAINST RECEIVER OF STATE COURT.

It is difficult to see how there can be any difference between the right of the Bankruptcy Court to issue summary process to obtain property in the hands of an assignee or third persons and the right to issue such process to obtain property held by a Receiver of a State Court. This is especially true in view of the facts of this case, for in reality the receivership proceeding of Ryerson & Son against M. Zier & Co., in the Floyd Circuit Court, was in all of its important respects a voluntary assignment. The petition filed for the appointment of this Receiver alleged that M. Zier & Co. was insolvent and that, unless a Receiver was appointed, its property would be dissipated. M. Zier, Vice-president and general manager of the corporation, selected the New Albany Trust Company as Receiver. This Receiver, or trustee, was proceeding to wind up the affairs of the estate. Under the law of the State of Indiana, there is no discharge from indebtedness under the voluntary assignment act. The trustee in such a proceeding is under the immediate direction and order of the Circuit Court. He may be removed by the Court; he can not do any legal act without the sanction of the Court; the claims against the estate are allowed by the Court and the Court distributes the proceeds. Burns' Annotated Statutes 1901, Secs. 2899 and 2912, inclusive.

Under these circumstances, we can not understand what difference there was between the character of these proceedings and the settlement of an estate under the voluntary assignment law.

"IN CUSTODIA LEGIS."

Property held by a sheriff under a writ of attachment or execution is as much *in custodia legis* as if held by a Receiver appointed either under the statutory or equity power of a Court. In Vol. 8 Am. & Eng. Ency. of Law, 532, under the title "Custody of the Law," it is said:

> "Whenever property has been seized by an officer of the Court by authority of its process, the property is to be considered in the custody of the Court and under its control for the time being; and no other Court has a right to interfere with that possession unless it be some Court which may have a direct supervisory control over the Court whose process has first taken possession, *or some superior jurisdiction in the premises.*"

In discussing the general rule that where property is in the possession of one Court of "concurrent" jurisdiction, such possession can not be disturbed by process out of another Court, it is said by this Court in the case of Coyal v. Heyman, 111 U. S., 176:

> "The point of the decision in Freeman v. Howe, *supra*, is that where property is taken and held under process, mesne or final, of a Court of the United States, it is in custody of the law, and within the exclusive jurisdiction of the Court from which the process has issued, for the purposes of a writ; that the possession of the officer can not be disturbed by process from any State Court, because to disturb that possession would be to invade the jurisdiction of the Court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to a suit or judgment, whose property has been wrongfully, or under color of process, taken and withheld may prosecute, by ancillary proceedings, in the Court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that Court."

And, continuing on in the opinion, it is said:

> "And, *vice versa*, the same principle protects the possession of property while thus held, by process issuing from the State Court against and disturbance under

process of the Courts of the United States; *excepting, of course, those cases where the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and of the laws of the United States.*" Porter v. Sabin, 149 U. S., 473."

But we are not without many respectable authorities holding that the Bankruptcy Court has the inherent power to issue summary process against the Receiver of a State Court to obtain possession of property belonging to the bankrupt's estate.

In the case of Moran v. Sturgis, 154 U. S., 256, a Receiver was appointed by the Supreme Court of New York to take charge of certain steamships. Afterward libels in admiralty in the District Court of the United States were issued and the marshal seized the boats. The proceedings in the State Court being first instituted, it was held that the Receiver, though he did not first obtain actual possession, he *did have constructive possession of the property when the marshal seized it.* And yet it was held by this Court that the District Court in admiralty had power to summarily take the property notwithstanding its possession by the Receiver of the State Court.

In re Merchants Insurance Co., 6 N. B. R., 43, decided by Judge Blodgett, formerly of the Seventh Circuit, is another case where it was held that this power resided in a Court of Bankruptcy. In this case, prior to the filing of a petition in involuntary bankruptcy, suit had been begun in the State Court of Illinois to dissolve the Merchants Insurance Company and a Receiver of the Company had been appointed in that suit. The question was whether or not the United States Court in Bankruptcy was justified in ordering its Receiver to take possession of the property, notwithstanding it was then in the possession of the Receiver of the State Court. It was held, squarely, that it was.

In upholding the same rule, Judge Bond, in the case of John L. Watson v. The Citizens' Bank of South Carolina, 11 N. B. R., 161, held:

"We are of the opinion that the jurisdiction of the United States Courts in Bankruptcy is an exclusive jurisdiction; that, although the State Courts have jurisdiction under their statutes to settle and arrange the affairs and distribute the assets of an insolvent corporation, their jurisdiction is at an end the moment the corporation is adjudicated a bankrupt by the District Court."

CONNOR'S PETITION TO THE STATE COURT.

With a view to observing the rule of comity and orderly procedure and to avoid a clash of jurisdiction between the Courts, before making any demand or attempting in any way to gain possession of the property, under the direction of the District Court, Mr. Connor, as Receiver, filed in the State Court in the suit in which the Receiver was appointed, an intervening petition, in which he recited the fact of his appointment and asked that the New Albany Trust Company be ordered to deliver the property to him. (R., p. 173.)

It can not be assumed that this intervention in the State Court was in any sense an admission of the right of that Court to exercise any jurisdiction over this property or even to pass on the question of whether it had jurisdiction or not. Its sole function was to apprise and inform the State Court of its duty to at once order the delivery of the property to the United States Receiver to avoid any unnecessary and unseemly conflict. In this act, as we contend, the Receiver of the District Court observed, to its fullest requirement, the rule of comity so much contended for by learned counsel for the petitioners. This was the only means by which the Federal Receiver could notify the Court of his appointment and give it an opportunity to release the property. And yet it is said by counsel that, by doing this, the Receiver became a party to the proceedings in the State Court and was bound to await its judgment. The authority referred to, of *in re* Lengert, 109 Fed., 927, is an approval of

the action of the Federal Receiver in this respect and holds, only, that the State Court should be apprised of the action of the District Court in appointing the Receiver, in order that it might order the property delivered. The Court held that the bankruptcy act gave exclusive jurisdiction to the United States Court in such matters and ousted the State Court of all jurisdiction therein. The language of the opinion on the subject of applying to the State Court for possession is as follows:

> "The Receiver of this Court is, therefore, entitled to the custody of the property, but in view of the comity which exists between the Federal and State Courts and the fact that a Receiver is an officer of the State Court and acts under its immediate direction, application should be made to it for a proper order in the case. *In re* Lesser, 3 Am. B. R., 815, (100 Fed., 133. Affirmed 5 Am. B. R., 329. In the meantime the Receiver in the State Court will be restrained from disposing of the property in any way. When the property is delivered to the Receiver of this Court, the sheriff may apply here for the allowance of his reasonable disbursements."

It being conceded that the jurisdiction in the United States Court, upon the filing of the petition in bankruptcy, was exclusive, and that the State Court was stripped of all its jurisdiction, then it must inevitably follow that the State Court had no power even to hear and determine the question of whether it would or would not relinquish the property. It became the duty of the State Court to turn the property over to the Federal Receiver at once, upon being informed by the intervening petition of the bankruptcy proceedings; and every step taken thereafter with reference to the property and its custody, the appointment of Kelso and the proceedings taken to regain the property forcibly, was *coram non judice*. It was not required, therefore, that the Federal Receiver should wait until it suited the convenience of the Floyd Cir-

cuit Court to pass upon his petition. The action of the State Court, as shown by the record, in contemptuously ignoring the petition and continuing it until the next term, is strongly indicative of what its course would have been in regard to this property. No rule of comity can so far override the Constitution and laws of the United States, giving jurisdiction to the District Courts in cases of this kind, as to require that it should do any more than it has done in this case.

AMENDMENT OF FEBRUARY 5th, 1903.

By the amendment of Congress to the bankruptcy act (Sec. 4, Cl. 3) approved and in force February 5, 1903, (the day before the petition herein was filed), the act of M. Zier & Co. in applying for a Receiver is made an act of bankruptcy.

On the question of whether this amendment applies to the proceedings in this cause, in the State Court, (confessing our inability to improve on his reasoning), we desire to quote somewhat at length from the opinion of the District Judge in this case. Judge Anderson said (R. p. 155):

> "It has been said that if the amendment of February 5, 1903, had been in force when this State Court receiver was appointed, that then, following the analogy of the voluntary assignment cases, the Receiver appointed by this Court would have the power summarily to take charge of the property. But it is maintained that the amendment of February 5, 1903, was not in effect, so far as any act of bankruptcy, prior to the time of its passage, is concerned. This amendment took effect on February 5, 1903. On February 6, 1903, these proceedings in involuntary bankruptcy were commenced. Shortly after the original petition was filed, an additional petition, or an additional cause was alleged in a supplemental petition filed under this amendment, reciting the fact that a receiver had been

appointed in the State Court at New Albany for M. Zier & Company. The question now, is, whether or not after the passage of this amendment, the appointment of a receiver, or the having suffered a receiver to be appointed within four months prior to that time, constituted an act of bankruptcy? It has been said that the question here is whether or not that amendment has a retroactive effect. It is well understood that Congress had the power to pass retroactive laws if it sees fit. The question then, is, whether or not Congress clearly intended the amendment to be retroactive in this respect.

"In the original act it was specifically provided that the act should go into force and effect on the first day of July, 1898. It was further provided that no petition for voluntary bankruptcy should be filed within one month, and no petition for involuntary bankruptcy should be filed within four months thereafter. When this amendment was made, no such provision was put into it, and the last clause of it, the last section of it provides:

"'The provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.'

"To my mind the fact that in the original act it was provided that no petition for voluntary bankruptcy could be filed within one month of the taking effect of the act, and that no petition for involuntary bankruptcy could be filed within four months of its taking effect, while in the amendatory act there is no postponement of the time, clearly indicates that Congress intended by its provisions to apply to any act of bankruptcy defined by its terms committed within four months prior thereto. It seems plain that when Congress passed this amendment and made no provision

for the postponement of its effect, that it intended that it should go into effect immediately.

"Not only that, but the wording of the amendment is very suggestive. The original act provides: 'Acts of bankruptcy by a person shall consist of his having . . . or (4) made a general assignment for the benefit of his creditors.' Now this fourth sub-division is amended as follows: 'Or (4) made a general assignment for the benefit of his creditors, or being insolvent, applied for a receiver or trustee for his property because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a State, of a territory, or of the United States.' If it was intended that that amendment should have only a prospective effect, why didn't the act say 'a receiver or trustee shall be put in charge of his property under the laws of a State, of a territory or of the United States?'"

If this be the true construction of the effect of the amendment, then all of the many decisions of this Court herein cited, holding that the Bankruptcy Court may summarily wrest property, belonging to a bankrupt, from a trustee under a voluntary assignment in a State Court, are applicable, with equal force, to the facts in this case. The District Court could very properly, then, have taken the summary action it is claimed to have taken to obtain this property, and its possession be proper and legal.

In any view of the case, a valid order of the lower Court has been wilfully violated. Its rightful authority has been assaulted, and it has been treated with the utmost contempt. The evidence shows that both the petitioners are guilty. Their only natural defense would seem to be, that they acted as they did, believing the law was with them. They do not justify on any such ground. Practically admitting the facts set out in the charges of contempt, they defend solely on the lack of jurisdiction of the District Court. Under circum-

stances like these, the finding and judgment of the Court was fitting and proper.

We ask, therefore, that the proceedings below be sustained and that the petitions for writ of *habeas corpus* be denied.

GEORGE H. HESTER,
WILLIAM WILHARTZ,

Counsel for Frederick D. Connor, Receiver in Bankruptcy, and Inland Steel Company, John C. Thurston and John Dey, Petitioning Creditors, and other creditors.